

IN RE:) Chapter 11
)
CVEO CORPORATION,) Case No. 01-223-SLR
f/k/a CONVERSE INC.,)
)
Debtor.)

At Wilmington this 8th day of February, 2002, having reviewed the papers submitted by counsel and having heard oral argument on debtor's motion to enforce and extend the automatic stay;

1. As an initial matter, the court finds that the instant proceeding is not one within the purview of the Eleventh Amendment. Unlike the facts in In re NVR, LP, 189 F.3d 442 (4th Cir. 1999), debtor at bar is not seeking payment of funds held by the State of North Carolina, nor is it seeking any other affirmative relief. Rather, it is requesting this court to interpret federal law in the interests of having the automatic stay provision applied equitably to all creditors. Moreover, the fact that other courts have undertaken this exercise without running afoul of the Eleventh Amendment lends support to the court's conclusion that it is not barred from doing so.

2. The court further concludes that the attempt by the North Carolina Department of Labor and the North Carolina Department of Justice (collectively "the State parties") to enforce the North Carolina Wage and Hour Act ("the Act") does not fall within the scope of 11 U.S.C. § 362(b)(4).

a. Section 362 provides, in relevant part:

(a) Except as provided in subsection (b) of this section, a petition filed under section 301, 302, or 303 of this title . . . operates as a stay, applicable to all entities, of —

(1) the commencement or continuation, including the issuance or employment of process, of a judicial, administrative, or other action or proceeding against the debtor that was or could have been commenced before the commencement of the case under this title . . . ;

. . .

(b) The filing of a petition under section 301, 302, or 303 of this title . . . does not operate as a stay —

. . .

(4) under paragraph (1), (2), (3), or (6) of subsection (a) of this section, of the commencement or continuation of an action or proceeding by a governmental unit . . . to enforce such governmental unit's . . . police or regulatory power . . . ;

b. The State parties contend that debtor violated the Act when it changed its vacation pay policy and deprived certain employees of vested vacation pay. The State parties have instituted administrative proceedings, with the threat of civil litigation to follow, pursuant to the provisions of § 95-25.22 of the Act:

(b) Action to recover such liability [for violations of the Act] may be maintained in the General Court of Justice by any one or more employees.

(c) Action to recover such liability may also be maintained in the General Court of Justice by the Commissioner at the request of the employees affected. Any sums thus recovered by the Commissioner on behalf of an employee shall be held in a special deposit account and shall be paid directly to the employee or employees affected.

c. The State parties argue in this regard that the § 95-25.22(c) action pursued against debtor furthers public policy because the State has an important interest in the uniform interpretation and enforcement of its laws, particularly in instances where, it is contended, the violation of the State law has been blatant.

d. The court declines to embrace the State parties' test for determining the scope of the police power exception to the automatic stay. Every governmental unit has a

legitimate interest in the uniform interpretation and enforcement of the law. To find that this interest is sufficient, in and of itself, to fall within the scope of § 362(b)(4) would be to ignore the analyses of the various courts that have struggled with the question. Instead, the court will look to the "public policy" test in order to distinguish between "government proceedings aimed at effectuating public policy and those aimed at adjudicating private rights." Eddleman v. United States Dep't of Labor, 923 F.2d 782, 791 (10th Cir. 1991). As explained in Chao v. Hosp. Staffing Servs., Inc., 270 F.3d 374 (6th Cir. 2001), the "public policy" test requires

courts [to] examine the type of enforcement action brought and the relationship between a particular suit and Congress's (or a state's) declared public policy. When an action furthers both public and private interests and the private interests do not significantly outweigh the public benefit from enforcement, courts should defer to the legislature's decision to vest enforcement authority in the executive and recognize such actions as within "such governmental unit's police and regulatory power," as that term is used in § 362(b)(4). However, when the action incidentally serves public interests but more substantially adjudicates private rights, courts should regard the suit as outside the police power exception, particularly when a successful suit would result in a pecuniary advantage to certain private parties vis-a-vis other

creditors of the estate, contrary to the Bankruptcy Code's priorities.

Id. at 390.

e. The court concludes that the enforcement action at issue serves the public interest only incidentally, that the State parties are adjudicating the private rights of employees who can pursue (and are pursuing) their rights individually through the bankruptcy claim process. Therefore, the police power exception does not apply and § 362(a)(1) operates to stay the continuation of the enforcement action at issue as against the debtor.

f. The court further finds that, by reason of the indemnification provisions applicable to Mr. Rupp, the protection of the automatic stay is extended to Mr. Rupp. See In re Continental Airlines, 177 B.R. 475, 479 (D. Del. 1993).

Sue L. Robinson
United States District Judge